

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PHI:TL-N-1490-99
JCFe

date: June 8, 1999

to: Chief, Examination Division, Pennsylvania District
Attn.: James Brandau, Case Manager

from: Assistant District Counsel, Pennsylvania District, Philadelphia

subject: [REDACTED] - Extension of Statute of Limitations of
Dissolved Subsidiaries - Forms 872

DISCLOSURE STATEMENT

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You have requested our advice for drafting the appropriate documents for extending the statute of limitations for certain dissolved and merged subsidiaries. As we understand the facts, for the taxable years in issue, each of the subject corporations were the highest tier domestic subsidiaries of a United Kingdom parent. After the taxable years, these corporations became part of a consolidated group and later merged or were dissolved and then liquidated into a common parent. The dissolved or merged corporations we incorporated under the laws of New York, New Jersey, Arkansas, and Delaware.

ISSUES

The issues presented are:

- (1) What are the proper forms to be executed to extend the statute of limitations for assessment and collection for the now dissolved and merged corporations.
- (2) How should the taxpayer be identified on those forms?
- (3) Who should sign the forms on behalf of the taxpayer?

CONCLUSION

We conclude the following:

- (1) For merged corporate taxpayers, we recommend that you secure Forms 872 and 977. For dissolved corporate taxpayers, we recommend that you secure Forms 2045 and 977. Although it may be redundant, we recommend that you also secure Form 872 if reasonably feasible to do so.
- (2) The Forms 872 should be styled:

"[Surviving Corporation] (EIN: XX-XXXXX), as successor in interest to [Merged Corporation] (EIN: XX-XXXXX)]"

The Forms 2045 and 977 are self explanatory.

- (3) All forms should be signed by the surviving or successor entity through an officer with authority to do so.

ANALYSIS

In order to properly address these issues, you must first understand that state law principles govern the procedures for extending the statutory period for assessment and collection of tax. Corporations are creatures of state statute first and taxpayers under Title 26 second. The corporation statutes are not uniform among the states, particularly in the areas of dissolution and winding up and successor liability.

In the case of the merged corporations, the first form to be executed of course is Form 872 (or Form 872A, as the case may be). The Form 872 should be executed by the surviving corporation and styled:

"[Surviving Corporation] (EIN: XX-XXXXX), as successor in interest to [Merged Corporation] (EIN: XX-XXXXX)]"

The Form 872, standing alone, may not be sufficient to protect the government's interests, however. The law of the indicated jurisdictions provide that when a merger occurs the new or surviving corporation is liable for the debts of the merged corporations. See, e.g. N.J.S.A 14A:10-6(e); NY CLS Bus Corp. §906(a)(3); Ark. Stat. Ann. §4-28-1005(b)(5); 8 Del. C. §259(a). The certificates of merger or merger agreements of the corporations may also provide for assumption of liabilities by the resulting or surviving corporation. However, any action to assess the primary liability against the new or surviving corporation must, in all likelihood, be taken within the statutory period of limitations for assessment against the merged corporations. Accordingly, we recommend that you have the surviving (transferee) taxpayer execute Forms 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax) in addition to Form 872, to preserve the liability for transferee liability.

In cases involving dissolved corporations, you should assume that Form 872 does not serve to extend or continue to extend the statutory period of limitations on assessment (see IRM 4582.21:(2)). If a corporation has been dissolved or is in the process of dissolving, care must be exercised to determine when the life of the corporation will expire under laws of the State of incorporation. The existence of a corporation generally ceases under state law upon the State's issuance of a certificate of dissolution. However the statutes in all the States now expressly continue the existence of a corporation which has dissolved for the purpose of gradually winding up the affairs, disposing of property, suing and being sued, and dividing assets. Some states continue the corporate life for a specified period of years¹.

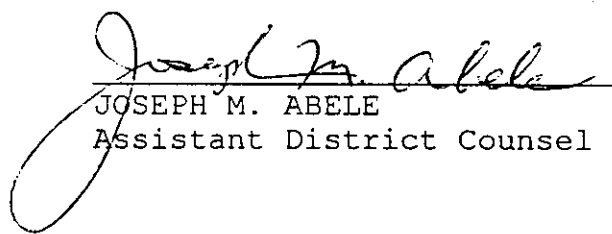
While application of such State laws do not preclude assessment of transferor liability within the normal 3 year period of limitations of I.R.C. §6501, it does limit the time in which an action can be prosecuted by or against a corporation in dissolution. After its existence is terminated, there is no person with authority to act on its behalf. Thus after the winding up period, there could be no determination of the merits of the Government's claim on behalf of the transferor (dissolved) corporation and also there would be no assets owned by the corporation from which the government can collect any assessment. For this reason you should not rely on a consent (form 872) to extend the statutory period of limitations beyond the statutory

¹ Our research indicates that only Delaware has such a provision with a term of years. See, 8 Del. C. §278.

winding up and termination periods². This is particularly so if the dissolved corporations have distributed all of their assets, which we suspect is the case. We recommend that you secure two forms for each dissolved corporation: Form 2045 (Transferee Agreement) and Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary). The Internal Revenue Manual specifically calls for Form 2045 to be secured in duplicate. We suggest that you secure the Form 977 in duplicate as well.

These forms are straightforward with respect to the information required to complete them. You should take care, however, in making sure that they are each signed on behalf of the surviving corporation by an officer presently authorized to do so.

Please call attorney James C. Fee, Jr. at (215) 597-3442 with any questions you may have. We are forwarding a copy of this advice to the Assistant Regional Counsel (Tax Litigation) (CC:NER) and to the Office of Assistant Chief Counsel (Field Service) (CC:DOM:FS:PROC) for mandatory 10 day post review.



JOSEPH M. ABELE
Assistant District Counsel

cc: Assistant Regional Counsel (Tax Litigation) (CC:NER)
Office of Assistant Chief Counsel (Field Service) (CC:DOM:FS:
PROC)

² Of Course, the most conservative course is to have Forms 872 executed, in addition to, the additional forms recommended herein. We don't think the taxpayer is likely to object.